Supreme Court, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH R. MABEY, Examiner of A.H. Robins Company, Incorporated,

Petitioner,

—v.—

The Official Committee of Equity Security Holders of A.H. Robins Company, Incorporated; A.H. Robins Company, Incorporated; Dalkon Shield Claimants' Committee of A.H. Robins Company, Incorporated; and Legal Representative of Future Tort Claimants of A.H. Robins Company, Incorporated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

Of Counsel:

JOHN S. KINZEY
PETER A. IVANICK
LYNN A. DUMMETT
LEBOEUF, LAMB, LEIBY & MACRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000

—and—

STEVEN J. MCCARDELL
LEBOEUF, LAMB, LEIBY & MACRAE
1000 Kearns Building
136 South Main
Salt Lake City, Utah 84101
(801) 355-6900

RALPH R. MABEY
Counsel of Record *Pro Se*
1000 Kearns Building
136 South Main
Salt Lake City, Utah 84101
(801) 355-6900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1267

RALPH R. MABEY,
Examiner of A.H. Robins Company, Incorporated,

Petitioner,

—v.—

The Official Committee of Equity Security Holders of A.H. Robins Company, Incorporated, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

A. In its opposition to the petition, the Official Committee of Equity Security Holders (the "Equity Committee") does not squarely address the question, which petitioner asks this Court to decide, of whether a debtor-in-possession has the power, subject to bankruptcy court supervision, to adopt a remedial program to mitigate injuries and claims resulting from the debtor's pre-bankruptcy tortious conduct. Instead, the Equity Committee, like the court of appeals, seeks to equate the establishment of a remedial treatment program to a cash distribution directly to claimants, and devotes most of its opposition to an argument that such distributions prior to the confirmation of a plan of reorganization are impermissible under the Bankruptcy Code. However, participants in the Robins' Emergency Treatment Program would receive the opportunity to undergo appropriate medical procedures, rather than cash distributions based

on the amount of their claims. By denying the Debtor's management the right to expend funds to provide these medical procedures, even though it is management's business judgment that the emergency treatment program is in the economic best interest of the company and its creditors, the lower court's decision significantly restricts the Debtor's ability to deal effectively with its fundamental difficulties, and thereby raises an important question of bankruptcy law that this Court should decide.

In response to petitioner's argument that the lower court's holding will adversely affect future reorganization cases in a wide variety of contexts, the Equity Committee suggests that these cases be addressed case-by-case as they arise. There is no reason, however, why the Court should not address now the issue raised by the petition. Not only is the issue of law an important one, but the Robins case itself is a major bankruptcy reorganization in which the injury and anguish created by the Dalkon Shield have had a nationwide impact. Further, because it is indisputable that the women who would participate in the emergency treatment program will inexorably lose the ability to mitigate their injuries as their reproductive years come to an end, this case squarely, and starkly, presents the question of whether a company in reorganization has the power to provide the mitigation necessary to reduce potential claims such as these before it becomes too late to do so.

B. If the Court agrees with petitioner that this case presents an issue worthy of the Court's consideration, it should not deny the petition on the basis of the Equity Committee's arguments that the case may become moot if a proposed plan of reorganization is ultimately confirmed. The Robins bankruptcy has been a protracted case marked by a high level of litigiousness and dozens of appeals to the court of appeals. Given the history of this case, petitioner believes it is highly unlikely that confirmation and consummation of a plan of reorganization will oc-

cur prior to the time the Court decides this case.[1] Denial of review would have a particularly harsh result in the circumstances of this case, because if the Equity Committee is wrong and the potential participants in the emergency treatment program are not receiving treatment pursuant to a confirmed and consummated plan by the time this appeal would have been decided, these women may have forever lost the opportunity to benefit from the medical treatment that might restore their fertility, and Robins will have lost forever its opportunity to mitigate their claims of injury.[2]

---

1 Under the proposed plan of reorganization now being considered in this case, the parties are under no obligation to consummate the reorganization until (1) the district court has entered a confirmation order disposing of a number of issues that are being contested in the case, and (2) all appellate review of this confirmation order has been exhausted. The likelihood is therefore high that final consummation of the reorganization plan will be delayed by one or more appeals.

2 In any bankruptcy case presenting the issue of the scope of the debtor's powers prior to confirmation of a plan, there is always the possibility that the case may be mooted by confirmation of a plan during the pendency of proceedings before the Court. Since the argument made by the Equity Committee could thus be raised in opposition to granting certiorari in any case that may hereafter arise, the Court would never have the opportunity to address the important issue of bankruptcy law raised by this case if it denies review simply on the possibility that the case may become moot.

Respectfully submitted,

RALPH R. MABEY
Counsel of Record *Pro Se*
1000 Kearns Building
136 South Main
Salt Lake City, Utah 84101
(801) 355-6900

Of Counsel:

JOHN S. KINZEY
PETER A. IVANICK
LYNN A. DUMMETT
LEBOEUF, LAMB, LEIBY
& MACRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000

—and—

STEVEN J. MCCARDELL
LEBOEUF, LAMB, LEIBY & MACRAE
1000 Kearns Building
136 South Main
Salt Lake City, Utah 84101
(801) 355-6900

Dated: March 11, 1988